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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES ALVIN RHODES and
GARVEY MARTIN CHEEK, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a defendant who has never been in a position to supervise five people during any one violation of the Drug Control Act can be convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848(b)(2)(A), solely on proof that he supervised a total of five people over the course of three violations constituting the enterprise?

II. Whether sentences of 75 and 50 years without parole, imposed for a first offense of engaging in a continuing criminal enterprise, must be examined under the proportionality analysis set forth in Solem v. Helm, 463 U.S. 277 (1983) to determine whether they violate the Eighth Amendment's ban on cruel and usual punishment?*

* All of the parties in the United States Court of Appeals for the Fourth Circuit are listed in the caption.

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The opinion of the United States Court of Appeals for the Fourth Circuit appears in the appendix (Appendix A, pp. 1a to 59a). The Order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing appears in Appendix B, p. 60a.

No. _____

IN THE
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JAMES ALVIN RHODES and
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v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
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JURISDICTIONAL STATEMENT

On December 26, 1985, the United States Court of Appeals entered Judgment and filed an Opinion affirming petitioners' convictions. On January 9, 1986, petitioners timely filed a Petition for Rehearing. On January 29, 1986, the Court of Appeals denied the Petition for Rehearing.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 20 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. §848 provides

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> * * *
>
> (b) For purposes of subsection (3) of this section, a person is engaged in a continuing criminal enterprise if -
>
> (1) he violates any provision of this subchapter or

> subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -
>
> (A) which are undertaken by such person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

The Eight Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Garvey Martin Cheek and James Alvin Rhodes were indicted on drug related

charges, including a charge of engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848. Both men entered pleas of not guilty and were convicted on all charges after a jury trial in the United States District Court for the Western District of North Carolina.

Prior to 1978 Martin Cheek was not involved in any criminal activity. In fact, Mr. Cheek operated a grocery store, which he ran with his wife, and was active in civic affairs; serving as the president of the Booster's Club of the local high school and providing food to the elderly. Cheek's involvement in drugs began in 1978 when he developed a personal drug problem. Cheek's involvement in drugs ended in the spring of 1980. Cheek's only other criminal conviction stemmed from tax problems arising out of the same activity. Nonetheless, Cheek received a sentence of 75 years

without parole for engaging in a continuing criminal enterprise. Cheek, who was 38 at the time of conviction, will not be eligible for release, assuming he receives the maximum good time credits, until he is 88.

The evidence concerning James Alvin Rhodes similarly indicated that he did not become involved in drugs until 1978, when he obtained some marijuana at the urging of a long-time friend. Rhodes, who earned his living as a professional gambler, had no criminal convictions prior to 1978. Nonetheless, Rhodes was sentenced to 50 years without parole for engaging in a continuing criminal enterprise. Rhodes, who was 42 years old at the time of conviction, assuming that he receives maximum good time credit, will not be eligible for release until age 80.

The focus of the trial was on the supervisory-position element of engaging in

a continuing criminal enterprise. In order to prove that a defendant engaged in a continuing criminal enterprise the government must prove that the defendant committed a violation of the Drug Control Act which was:

> [P]art of a continuing series of violations ... which are undertaken by such person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management.

21 U.S.C. §848(b)(2).

The government's proof on this element demonstrated that each petitioner was involved in the importation of marijuana. Petitioners essentially acted as middlemen between the importers of the marijuana and the ultimate distributors. The evidence demonstrated that Cheek occupied a supervisory position on three occasions, and that Rhodes occupied a supervisory position on four occasions. On none of these occa-

sions, however, did either petitioner occupy a position of supervision with respect to five or more people. However, because the people under supervision changed from occasion to occasion, each petitioner supervised a total of five or more different people during the violations that comprised the enterprise.[1]

On appeal, both petitioners challenged the sufficiency of the evidence to support convictions of engaging in a continuing criminal enterprise. Petitioners argued that, properly construed, 21 U.S.C. §848 required proof that a defendant occupied a supervisory position with respect to five or more persons during each of the requisite three related violations that constitute a continuing criminal enterprise.

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[1] To establish a "continuing series" of violations of the Drug Control Act the government must prove at least three related violations. United States v. Johnson, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979).

Petitioners also argued that their sentences, which guaranteed that they will spend the rest of their natural lives in prison for a first offense of engaging in a continuing criminal enterprise, were disproportionate to their crime and violated the eighth amendment's ban on cruel and unusual punishment.

The Court of Appeals rejected both contentions. The court read section 848 as only requiring that a defendant supervised a total of five persons at various times over the three violations. The Court of Appeals refused to engage in a thorough analysis of the proportionality of the sentences, and held that the proportionality analysis mandated by Solem v. Helm, 463 U.S. 277 (1983), is required "only in those cases involving life sentences without parole." The Court of Appeals subsequently denied petitioners' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. THE CONSTRUCTION GIVEN TO 21 U.S.C. §848 BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case involves the proper construction of 21 U.S.C. §848, the continuing criminal enterprise (CCE) statute. The importance of the issue presented stems both from unparalleled harshness of the punishment provided for those convicted of engaging in a continuing criminal enterprise, which is the only federal offense authorizing life in prison without parole, and from the government's increasing propensity for charging under the CCE statute, as evidenced by the increasing number of reported decisions. This Court has recognized the importance of a proper construction of the CCE statute in Garrett v. United States, ___ U.S. ___, 105 S.Ct. 2407

(1985), and in Jeffers v. United States, 432 U.S. 137 (1977), when it considered the relationship between section 848 and the underlying charges that constitute the enterprise. This Court, however, has not yet examined the relationship between the size requirement and the longevity requirements of section 848, an issue that is squarely presented by this case.

Under the construction adopted by the Court of Appeals, a defendant who supervises a single different underling during each of five violations can be convicted of engaging in a continuing criminal enterprise and sentenced to life in prison without parole, while the manager of a cohesive group of the same four underlings can engage in as many drug violations as he chooses without running the risk of a CCE conviction. Petitioners here are in the position of the defendant who had the mis-

fortune to have a change in underlings, and their convictions can only be sustained if the Court of Appeals' construction is correct.

A. Fundamental Principles of Statutory Construction Require that CCE be Limited to Those Who Manage Five Persons on Each Violation in the Continuing Series.

1. The Language of Section 848 Reveals Congress' Intent to Limit CCE Prosecutions to Those Who Are in a Position to Manage Five Persons on Each Violation in the Continuing Series.

The actual language used by Congress in drafting section 848 indicates that the requirement that the defendant be in a position to supervise five people applies to each of the "violations" that make up the series, rather than to the "series" as a whole. The use of the word "are" indicates that the supervisory requirement applies to the plural "violations" and not to the singular "series," and that the size require-

ment applies to each violation. In other words, a defendant must be in a position to supervise at least five persons during each of at least three violations.

This reading of the language of section 848 follows its clear meaning, and is consistent with Congress' intent to separate carefully the "top brass" from the "lieutenants". To achieve its purpose, Congress defined the class of defendants subject to CCE prosecution by a number of related criteria: (1) continuity of the criminal activity; (2) size of the group committing the criminal acts; and (3) defendant's position within the group.[2] Each of these criteria serve to limit the reach of §848. The "continuing series" requirement limits the reach of the statute to defendants involved in ongoing drug

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[2] Section 848 also requires proof that a defendant obtained substantial income from the activity, which further limits the reach of the statute.

activity. The "five or more other persons" requirement limits CCE prosecutions to defendants involved in large organizations. More important, the managerial position requirement limits the reach of CCE to those members of the large, ongoing organization who present the greatest danger to society.

As this Court observed in Garrett, "[a] commonsense reading of this definition reveals a carefully crafted prohibition aimed at a special problem. This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." ___ U.S. at ___, 105 S.Ct. at 2413 (emphasis added). The Court of Appeals, however, rejected the commonsense reading and turned Congress' carefully crafted provision into an arbitrary method for determining which drug offenders are

subject to the draconian penalties provided by section 848.

2. Harmonizing CCE with the size and continuity requirements of other similar organized crime statutes.

The CCE provision of the Drug Control Act was enacted within 12 days of the Organized Crime Control Act of 1970, which included prohibitions against gambling businesses that now appear at 18 U.S.C. §1955. Congress was clearly aware of the definitions and language used in the Organized Crime Control Act when it enacted the Drug Control Act. Russello v. United States, ___U.S. ___, 104 S. Ct. 296, 301 (1983), and their provisions should be read in pari materia. Northcross v. Memphis Board of Education, 412 U.S. 427 (1973). The lower court's construction of §848, however, ignores the construction of the parallel provisions of section 1955.

Congress enacted 18 U.S.C. §1955 as a complement to 21 U.S. §848. Section 848 was intended to strike down large, ongoing drug organizations, while section 1955 was aimed at large, ongoing gambling organizations. Section 1955 applies only to those who conduct gambling operations that involve five or more persons and which remain in substantially continuous operation for at least thirty days. Both section 848 and section 1955 are aimed at organizations of a certain size that exist over a minimum time period.

The courts have consistently construed section 1955 as requiring that at least five persons be involved in the gambling operation throughout the entire thirty days, rejecting the claim that only a total of five people need to be involved at some time during the thirty days:

> The quantitative requirements that the business be conducted by at least five persons and be in operation for a period in excess of thirty days furnish a more sensible standard for measuring substantiality if they are construed co-jointly. Size and continuity, when joined together in the proportions established by Congress, demonstrate that a gambling enterprise is of sufficient magnitude to warrant federal regulation.... Viewed in light of the congressional intent to bring within federal criminal legislation not all gambling, but only that above a certain minimum level, a construction of the statute that fuses the size and continuity elements of the standard for determining what is an illegal gambling business seems most appropriate.

United States v. Bridges, 493 F.2d 918, 922 (5th Cir. 1974) (citations omitted). Accordingly, "a four-person operation with changing personnel would be outside the reach of the statute." United States v. Gresko, 632 F.2d 1129, 1133 (4th Cir. 1980).

This construction of §1955 is based on the statutory language, the intent of

Congress, and the recognized principle that "[a] criminal statute is to be construed strictly, not loosely." Bridges, 493 F.2d at 923, quoting United States v. Boston and Main Railroad Co., 380 U.S. 157, 160 (1965). These factors compel adopting a similar construction of the size and continuity requirements of §848. If a four-person operation with changing personnel is outside the reach of §1955, it is clearly outside the reach of section §848.

3. Section 848 must be construed narrowly.

To the extent that there is any ambiguity in the language of section 848, the well-recognized principle that a criminal statute must be construed narrowly militates against the broad construction adopted below. Albernaz v. United States, 450 U.S. 333 (1981); United States v. Boston and Main Railroad Co., 380 U.S. 157 (1965). Clearly petitioners may be pun-

ished for any substantive offenses they committed, but any question whether Congress intended to subject persons in their position to life in prison without parole must be answered in petitioners' favor.

4. The lower court's construction leads to absurd results.

A statute should never be given a construction that lead to absurd or unjust results. United States v. Mendoza, 565 F.2d 1285, 1288-89 (5th Cir. 1978). As noted previously, the lower court's construction produces absurd and unjust results by authorizing conviction of engaging in a continuing criminal enterprise of a defendant who hires a single different person to help unload a car on each of five occasions, while not authorizing convictions for a defendant who uses the same unloader for each of five violations, or even the defendant who employs a consistent group of four persons to commit continuing

drug violations. This construction, which punishes defendant who are part of small, changing organizations but does not punish defendants who head larger, cohesive groups, is absurd.

B. The Court of Appeals Failed to Advance Any Reason for Adopting its Construction of §848.

A factor that increases the importance of this case is the fact that, although petitioners thoroughly briefed and argued their position, the court's sole reason for rejecting petitioners' position was that the Ninth Circuit had rejected a similar claim in United States v. Smith, 690 F.2d 748 (9th Cir., 1982), cert. denied sub. nom Fisherman v. United States, 460 U.S. 1011 (1983). Smith, however, contained no rationale for adopting the government's proposed construction other than its reliance on a number of cases indicating that the five persons need not all be working at

any given moment during the violation. The distinction between the claim that all five persons need to be actively involved at the same time during a violation and the claim that defendant must be in a position to supervise five persons at various points during the commission of a violation is important. In fact, the Fifth Circuit made a similar distinction in construing §1955, holding that it is sufficient if the gambling business "involved" five persons throughout the thirty days, but that all five need not work simultaneously. United States v. Marrifield, 515 F.2d 877 (5th Cir.), cert. denied, 423 U.S. 1021 (1975). Smith, and the cases cited by that Court, simply does not support the construction of section 848 adopted by the Fourth Circuit.

C. This Court Should Review the Construction Adopted by the Fourth Circuit to Ensure that Section 848 Remains "A Carefully Crafted Prohibition Aimed at a Special Problem."

The CCE statute was intended to serve a limited, but important, purpose: it was designed to strike down the leaders of cohesive, ongoing drug organizations. Congressional intent, however, has been seriously undermined by the Fourth Circuit's construction, which turns an exceptionally accurate and high-powered weapon into the judicial equivalent of a Claymore mine; capable of great destruction but indifferent to the identity of its victims. This Court should take this opportunity to return section 848 to its intended construction.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT RESOLVED PETITIONERS' CLAIMS THAT THEIR SENTENCES VIOLATED THE EIGHTH AMENDMENT IN A MANNER THAT CONFLICTS WITH THE APPLICABLE DECISION OF THIS COURT.

In Solem v. Helm, 463 U.S. 277 (1983), this Court held that under the eighth amendment, "as a matter of principle ... a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. at 290. This Court specifically rejected the contention that a sentence of imprisonment that falls within the statutory maximum is exempt from eighth amendment proportionality review. Id. at 289-90. The proportionality analysis required by the eighth amendment includes analysis of "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id. at 292.

Petitioners have received sentences that will require them, as a practical matter, to spend the rest of their adult lives in prison as the result of their first serious criminal conviction. Petitioners urged that the Fourth Circuit review these draconian sentences under the proportionality test set forth in Solem v. Helm; the Court refused, holding that "Solem requires an extensive proportionality analysis only in those cases involving life sentences without parole." Slip op. at 23.

The decision in Solem, while involving a life sentence without parole, did not limit its scope to such sentences. In fact, this Court stressed that it first applied a proportionality analysis in Weems v. United States, 217 U.S. 349 (1910), in which defendant received a sentence of 15 years at hard labor.

The Fourth Circuit did recognize that its analysis was "complicated" by the fact that petitioners' sentences are, for practical purposes, the equivalent of life without parole. As an alternative ground, the court engaged in "less than extended" or "perfunctory" proportionality review. Slip op. at 25. The court's perfunctory analysis, however, only dealt with one of the Solem factors, the seriousness of the crime. After concluding that petitioners had committed grave offenses, the court affirmed the sentences.

The court's analysis completely ignores two other key Solem factors: the sentences received by other defendants for similar crimes in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. In addition, the court's analysis of the seriousness of the offense committed failed to

take into account that there are numerous offenses, such as assassination of the President, espionage, and aircraft piracy leading to death, more serious than a CCE for which life imprisonment without parole is not authorized.

By engaging in this perfunctory analysis, the court was able to ignore the undisputed fact that petitioners received the most severe sentence imposed on any defendant between July 1, 1980 and June 30, 1982. According to the Sentences Imposed Chart, published by the Administrative Office of the Courts, no defendant received a sentence in excess of 45 years without parole during this time period, and even the average CCE sentence was slightly in excess of 20 years. The Court of Appeals, however, did not consider the disparity between petitioners' sentences and those received by other defendants.

The court also ignored the punishment imposed on defendants in other jurisdictions for similar offenses. The relevant jurisdiction, other than other federal courts, is the State of North Carolina, where the bulk of the offenses were committed. North Carolina also has a continuing criminal enterprise statute closely parallel to section 848. See N.C.G.S. §90-95.1 (1979). A defendant convicted in state court of engaging in a continuing criminal enterprise would be punishable by a maximum of life in prison, but would be eligible for parole after 10 years. N.C.G.S. §§14-1.1(a)(3); 15A-137(c)(1). The Court of Appeals, however, failed to consider this factor.

In reading Solem as requiring, at most, only a perfunctory proportionality analysis of a sentence that results in life imprisonment without parole - and no analy-

sis of lesser sentences - the Fourth Circuit resolved this case in a manner inconsistent with this Court's holding in Solem.

III. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT RESOLVED PETITIONERS' CLAIMS THAT THEIR SENTENCES WERE DISPROPORTIONATE TO THEIR OFFENSES IN A MANNER CONFLICTING WITH DECISIONS FROM OTHER CIRCUITS.

The Fourth Circuit's explicit refusal to engage in the thorough proportionality analysis articulated in Solem is in direct conflict with the Eleventh Circuit's decision in United States v. Darby, 744 F.2d 1508 (11th Cir. 1984), cert. denied, ___ U.S. ___ (1985), and the Second Circuit engaged in a similar thorough analysis of a 10-year sentence for distribution of heroin in United States v. Ortiz, 742 F.2d 712 (2d Cir.), cert. denied, ___ U.S. ___ (1984).

In both Darby and Ortiz, the courts recognized that a defendant who receives a sentence of imprisonment short of life with-

out parole is nonetheless entitled to a thorough proportionality analysis. Darby is most clearly analogous to this case, as defendants in Darby were convicted of engaging in a continuing criminal enterprise and received sentences that ensured they would spend the rest of their lives in prison. In Darby the defendants headed a world-wide drug organization that lasted seven years and may have involved hundreds of persons. 744 F.2d at 1527. The court, nonetheless, recognized that Solem requires more than a determination of the gravity of the offense; it requires comparison with sentences authorized for other crimes, comparison of sentences received by other CCE defendants across the country, and comparison with similar state law provisions. 744 F.2d at 1528-29. Only after engaging in an analysis of all of these factors did the court in Darby uphold the sentences.

In Ortiz, defendant received a 10-year sentence for distribution of heroin, and was likely to be paroled after 24 months. The court, nonetheless, engaged in the thorough proportionality analysis required by Solem, and examined not only the gravity of the offense, but also sentences received by other federal defendants for the same and similar crimes and sentences received under state law. Only after engaging in this analysis did the court find that Ortiz's relatively lenient sentence was not in violation of the eighth amendment. 742 F.2d at 715-7.

The Fourth Circuit here specifically rejected the analysis used in Darby, stating that: "Unlike the court in Darby, we dc not think that the sentences imposed in this case require an extended proportionality analysis." Slip op. at 25. As a result, there is now a clear split in the

circuits as to what analysis is required when a term of imprisonment is challenged under the eighth amendment. This Court should grant the writ of certiorari to ensure that the principles articulated in Solem are consistently applied throughout the circuits.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review that court's decision affirming petitioners' convictions.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5241

United States of America,

Appellee

versus

James Alvin Rhodes,
a/k/a Mickey Rhodes,

Appellant

No. 84-5242

United States of America,

Appellee

versus

Garvey Martin Cheek,

Appellant

Appeals from the United States District Court for the Western District of North Carolina, at Statesville. Robert D. Potter, District Judge. (CR ST-CR-84-15-1 and ST-CR-84-15-2)

Argued March 6, 1985 Decided December 26, 1985

Before WIDENER, PHILLIPS and SNEEDEN, Circuit Judges.

Thomas K. Maher; Thomas F. Loflin, III (Loflin & Loflin; Irvin B. Tucker, Blanchard, Tucker, Twiggs, Earl & Abrams; David S. Rudolf, Beskin & Rudolf, on brief) for Appellants; Max O. Cogburn, Jr., Assistant United States Attorney (Charles R. Brewer, United States Attorney, on brief) for Appellee.

WIDENER, Circuit Judge:

Garvey Martin Cheek and James Alvin "Mickey" Rhodes were convicted under 21 U.S.C. Section 848 and other statutes for engaging in a continuing criminal enterprise (CCE) and other offenses on the basis of their dealings in controlled substances. Check received a 75-year sentence without parole under Section 848, while Rhodes

received a 50-year sentence without parole under that statute. Both received various other sentences. Cheek and Rhodes appeal their convictions on several grounds, but we find no reversible error and affirm.

Cheek and Rhodes were convicted after a jury found them guilty of several charges in a multicount indictment. Count 1 of the indictment charged that from August 1978 through April 1980 Cheek and Rhodes and others conspired together and with yet others to possess and distribute cocaine and marijuana in violation of 21 U.S.C. Sections 841(a)(1), 846. Counts 4 and 5 charged that on or about November 22, 1979 Cheek, Rhodes and others unlawfully possessed with intent to distribute more than 1000 pounds of marijuana, and that they did distribute same in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2. Counts 6 and 7 of the indictment charged

Cheek, Rhodes and others with an April 1980 unlawful possession with intent to distribute and with the distribution of greater than 1000 pounds of marijuana in violation of 21 U.S.C. Section 841(a)(1), 18 U.S.C. Section 2. In Counts 2 and 3, Cheek and others were charged with the unlawful possession with intent to distribute and the distribution of approximately four kilograms of cocaine in or about October 1979. Counts 8, 10, and 11 charged Cheek with separate Travel Act violations under 18 U.S.C. Section 1952, and Count 12 charged that Cheek engaged in a continuing criminal enterprise from October 1979 to April 1980 in violation of 21 U.S.C. Section 848. Count 16 of the indictment charged Rhodes with engaging in a continuing criminal enterprise from October 1978 to April 1980 in violation of 21 U.S.C. Section 848. Cheek was convicted on the

charges in all eleven counts and received total sentences of 75 years on the felony violations other than for a continuing criminal enterprise, to run concurrently with a 75-year no parole sentence on the continuing criminal enterprise conviction. Rhodes was convicted of the charges in all six counts and received total sentences of forty-five years on the felony convictions other than for a continuing criminal enterprise, to run concurrently with a 50-year no parole sentence on the continuing criminal enterprise conviction.

No question is raised as to the sufficiency of the evidence to support any of the convictions except those of the continuing criminal enterprise under 21 U.S.C. Section 848.

Cheek's and Rhodes' convictions arose out of various illegal drug operations through which large quantities of cocaine

and marijuana were transported from either Florida or South Carolina into the Western District of North Carolina. The evidence showed that both Cheek and Rhodes were involved in bringing controlled substances into North Carolina on several occasions. While the evidence regarding Cheek's and Rhodes' involvement in the smuggling operations overlaps to a certain extent, we will discuss separately the evidence as it relates to each.

CHEEK

Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), the record shows that Cheek was involved in several drug transactions during the relevant time period charged in the continuing criminal enterprise count. The evidence shows that during late October and early November, 1979, Cheek at his residence in

Perrine, Florida arranged for the purchase of four kilograms of cocaine from one Maynard Gonzalez, Jr. for a price of $200,000. Gonzalez let Cheek take possession of all four kilograms of the cocaine in exchange for payment of one-half of the purchase price. After paying $104,000 to Gonzalez, Cheek took possession of the cocaine in Florida. Cheek and Rocky Townsend, a witness for the government, loaded the cocaine into a car and drove to Wilkes County, North Carolina, where the cocaine was distributed to Shelton Wiles. Several weeks after Cheek and Townsend had delivered the cocaine to Wiles in North Carolina, Cheek called upon Townsend to deliver the balance of the cocaine purchase price to Gonzalez at a motel in Charlotte, North Carolina. Townsend complied and delivered the money to Gonzalez for Cheek.

The evidence shows that Cheek under-

took this large cocaine transaction to make enough money to cover expenses on an upcoming marijuana transaction that was scheduled to occur around Thanksgiving of 1979. Government witness Jorge Felix Aragon testified that he and his brother, Fred Aragon, arranged to import 5000 pounds of marijuana from Columbia, South America into Florida and that they intended to sell the marijuana to Cheek, Rhodes, and an unnamed individual. Like the Aragons had done on previous marijuana importations, on the Thanksgiving deal they were responsible for obtaining the marijuana in Columbia and for the transportation and offloading of such in southern Florida. The record fairly shows that Cheek was responsible for making the arrangements to receive the marijuana from the offloaders and to transport it to a "stash house" for later distribution into North Carolina. Cheek directed two women,

Dorothy Hodges and Peggy Jordan, to rent rooms at two motels in Homestead, Florida, where the marijuana would be received from the offloaders. Townsend, at Cheek's direction, accompanied Hodges and Jordan to two motels, and two rooms were rented. From the two motel rooms, the marijuana would be transported to the stash house which had been secured by Jorge Aragon. As planned, the offloaders drove the marijuana from the coast to the motel rooms, and several individuals who knew where the stash house was located, but who had no relationship with the offloaders, drove the marijuana to the stash house for unloading and weighing. Cheek, Aragon, and Duke Shew waited at the stash house and were responsible for weighing and numbering the bales of marijuana. Within a few days, the transfer process was completed and all but 1200 pounds of wet marijuana was taken from

the stash house for distribution. Cheek, Aragon, and Dorothy Hodges soon thereafter flew into Charlotte, North Carolina, and went to Rhodes' house in North Wilkesboro, where they met Rocky Townsend who had driven a load of the wet marijuana out of Florida. Cheek and Aragon spread out the wet marijuana in Rhodes' garage and worked for a few days to dry it out. Thereafter, Aragon stayed in Wilkesboro waiting for Cheek and Rhodes to sell the marijuana from the Thanksgiving deal so that they would be able to pay Aragon with the proceeds. Shortly thereafter, however, Cheek arranged for Rocky Townsend to leave North Carolina and to drive down to Cheek's house in Florida to pay Aragon $500,000 for the marijuana. At Cheek's direction, Townsend drove to Cheek's house in Florida and paid Aragon $500,000 for the marijuana.

The evidence shows that Cheek was

involved in another marijuana transaction with Jorge Aragon in the spring of 1980. Cheek accompanied Aragon to Barranquilla, Columbia in preparation for an upcoming deal. Through the Aragon brothers' Columbian connection, 10,000 pounds of marijuana would be airdropped to a yacht off the Florida Keys, unloaded at a house in Islamorada in the Keys, and distributed to Cheek, Rhodes, and unnamed "people up north." Fred Aragon arranged for the Islamorada house and instructed his brother Jorge to stay in the Florida Keys and monitor Coast Guard movement. Before the airdrop, Jorge Aragon contacted Cheek and told him that he needed more money for expenses on the Islamorada operation. Cheek contacted Shelton Wiles and told him to get someone to bring down more money to Florida for expenses. The next day, Cheek's wife flew down to Florida and gave

Cheek $10,000. Cheek gave Aragon the money and directed Rocky Townsend to assist Aragon in monitoring Coast Guard activity. The airdrop was successful and the marijuana was unloaded at the Islamorada house. Cheek, Aragon, Townsend, and unnamed Cuban weighed the marijuana, separated out the bales that were wet, and loaded the dry bales into cars. Townsend testified that he remembered loading the cars for Tony Sidden and his wife, Gloria Sidden, and Wayne Shepherd; and such testimony is consistent with Jorge Aragon's testimony to the effect that he recalled these three individuals were working for Cheek. When the marijuana had been weighed and loaded into cars, Townsend drove a carload of marijuana to Statesville, North Carolina, and Aragon went up to North Carolina to collect from Cheek and Rhodes for their respective purchases of 6500 and 1100

pounds of the Islamorada marijuana.

RHODES

The record shows that Rhodes was involved in several marijuana transactions during the relevant time period charged in the CCE count, October 1978 through April 1980. Government witness Jeffrey VanMeter testified that he and Rhodes had been involved in several marijuana deals in 1978 and 1979. The evidence shows that in late 1978 Cheek unloaded 17,000 pounds of marijuana (that Cheek had been involved in importing through Myrtle Beach, South Carolina) at a farm in Alexander County, North Carolina which Rhodes had used previously for distribution of marijuana. In the words of VanMeter, part of the 17,000-pound load did not go to Rhodes, but, rather, went to someone else. The record shows that Rhodes, VanMeter, and Russell Gambill worked together to sell their

portion of the 17,000-pound load and that when Cheek went to Rhodes' house to collect the money on the marijuana that he had fronted, they returned 2000 pounds of the marijuana they could not sell.

The evidence shows that Rhodes became involved with the Aragon brothers in the fall of 1978 when the Aragons smuggled a load of marijuana into Miami, Florida from Columbia, South America and through Van-Meter sold a quantity of marijuana to Rhodes. In early 1979, Rhodes met with the Aragons in Wilkesboro and they discussed whether Rhodes would help finance an airplane so that the Aragons could continue their smuggling ventures by air rather than sea. Although the record does not show clearly whether Rhodes agreed to finance the venture, it does show that the Aragons were able to purchase an airplane and that they planned to airdrop a load of marijuana

in the spring of 1979, promising to give at least 2000 pounds to Rhodes in exchange for some money that he had paid to them. Jorge Aragon testified that from this airdrop operation they did not have 2000 pounds of marijuana to give to Rhodes and that he was not sure how much Rhodes actually received.

Aside from Rhodes' involvement with the Aragons, the evidence shows that Rhodes obtained marijuana from another source in Florida. The record shows that in May or June of 1979 Rhodes sent several cars from North Wilkesboro to Fort Lauderdale to pick up marijuana from two friends named Patty and Rob. VanMeter testified that he went to Fort Lauderdale and loaded the marijuana in the cars that Rhodes had sent from North Carolina. VanMeter testified that after he loaded the cars he went to North Wilkesboro, where Rhodes gave him $600,000 to

take back to Patty and Rob in Fort Lauderdale. VanMeter, accompanied by Clay Green, went to Florida and paid Patty and Rob for Rhodes.

The evidence shows that after the Fort Lauderdale transaction Rhodes became involved with the Aragons and Cheek in the Thanksgiving marijuana deal of 1979. Before the importation, Rhodes sent VanMeter down to Florida, and Jorge Aragon filled VanMeter in on the details of the operation to transport the marijuana from the two motel rooms, which Cheek had arranged to be rented, to the stash house for distribution. VanMeter drove two carloads of marijuana to the stash house but quit and went to Fort Lauderdale because he was disgusted that the marijuana was wet. While the record shows that Wayne McNeil took VanMeter's place in the Thanksgiving operation, VanMeter testified that he later

helped McNeil load up a motor home with marijuana at Cheek's house in Florida. When the distribution had been accomplished, Cheek and Aragon arrived at Rhodes' house in Wilkesboro and attempted to dry out a load of the wet marijuana which had been brought out of Florida. After Cheek and Aragon had finally dried the marijuana, Rhodes refused to let them stay at his house. VanMeter further testified that shortly after the Thanksgiving deal with Cheek and Aragon, he drove a load of 600 to 700 pounds of marijuana supplied by Patty and Rob from Florida to North Carolina and that for his efforts Rhodes paid him $1,000.

The record shows that Rhodes was again involved with Jorge Aragon and Cheek in the 1980 marijuana importation off Islamorada, although it does not indicate that Rhodes was involved in any planning of the opera-

tion with Aragon and Cheek. However, the evidence does show that Aragon called Rhodes and told him that the Islamorada marijuana load was in and to send some people down to pick up what Aragaon could give him from the load. Aragon testified that four drivers came to Florida and picked up approximately 1100 pounds of the marijuana for Rhodes. Aragon could identify two of the drivers as Wayne McNeil and Kim Edmiston but was unable to identify the other two drivers.

In addition to the detailed evidence which was presented by the government with respect to the aforementioned marijuana deals, Peggy Jordan and Dorothy Hodges testified that they went to Florida to pick up carloads of marijuana for Rhodes in the summer of 1979. Dorothy Hodges further testified that during this time period Wayne McNeil, Kim Edmiston, and a man named

"Clay" drove her car to Florida to pick up marijuana for Rhodes.

Cheek and Rhodes appeal their CCE convictions on several grounds. Cheek and Rhodes assert: that they were improperly convicted of engaging in a continuing criminal enterprise under 21 U.S.C. Section 848; that their respective sentences of 75 years without parole and 50 years without parole violate the Eighth Amendment's prohibition against cruel and unusual punishment since the sentences are disproportionate to the crimes for which they were convicted; that the district court committed reversible error by admitting evidence of other wrongs or acts committed by both defendants which were not charged in the indictment; and that the district court improperly admitted the contents of a spiral notebook, allegedly containing drug business records between Rhodes and Cheek,

because the notebook was seized in violation of the defendants' Fourth Amendment rights. Rhodes separately argues that the court improperly admitted a statement he made to police officers that allegedly was the product of custodial interrogation. We will address these contentions in order.

CCE CONVICTIONS

To obtain a CCE conviction under Section 848, the government must prove that the accused violated a specified federal drug law, the violation of which is punishable as a felony, see 21 U.S.C. Section 801 et seq.,1 and that such violation was a part of a "continuing series of violations" of the specified federal drug laws. Section 848(b)(2) sets forth the essential

1. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. Scts. 801-904); Controlled Substances Import and Export Act, Pub. L. No. 91-513, 84 Stat. 1285 (codified as amended at 21 U.S.C. Scts. 951-970).

elements for what constitutes a continuing series of violations by providing in relevant part that:

> [S]uch violation is a part of a continuing series of violations [of the specified drug laws] --
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management and,
>
> (B) from which such person obtains substantial income or resources.

21 U.S.C. Section 848(b)(2). Cheek and Rhodes argue that their CCE convictions were improper because the government failed to prove that either defendant occupied a managerial, organizational, or supervisory position over the requisite number of people within the proscription of Section 848(b)(2)(A). They contend that Section 848 requires the government to prove that an accused occupied a managerial position

with respect to at least five persons on each of the underlying felony drug violations constituting the continuing series of violations. The government, on the other hand, takes the position that Section 848 merely requires proof that an accused occupied a managerial, organizational, or supervisory position with respect to at least five people during the course of the overall series of violations.

To support the contention that the CCE convictions were improper because the government failed to prove that either defendant occupied a managerial position with respect to at least five people on each underlying violation, defendants contend that the language of the statute itself indicates that the numerosity requirement relates to each individual violation as opposed to the series of violations as a whole. In this regard, they point to

the relevant part of Section 848 which provides that the government must prove that a specific felony drug violation "is a part of a continuing series of violation... which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management." Id. Section 848(b)(2)(A) (emphasis added). The argument goes that if Congress had intended for the numerosity requirement to relate to the entire series of violations as a whole, Congress would have used the word "is" instead of "are" as the proper verb form to indicate that the numerosity inquiry focuses on whether the series of violations is undertaken in concert with five or more other persons. The use of the word "are" indicates, the defendants say, that Congress intended for the five-person

requirement to relate to the term "violations" rather than to the term "series" and that, consistent with this legislative intent, the five-person minimum must be proven with respect to each underlying felony drug violation. Cheek and Rhodes assert that since the government did not prove that either of them occupied a managerial position with respect to the five people during any of the underlying drug violations, their CCE convictions were improper and should be reversed.

We have found no cases to support the sought for construction of Section 848. Defendants have candidly admitted that courts considering the five-person requirement uniformly have found that the five people under a defendant's management need not have worked in the drug business at the same moment. See United States v. Smith, 690 F.2d 748, 750 (9th Cir. 1982), cert.

denied sub nom. Fisherman v. United States, 460 U.S. 1011 (1983); United States v. Losada, 674 F.2d 167, 173-74 (2d Cir.), cert. denied, 457 U.S. 1125 (1982); United States v. Phillips, 664 F.2d 971, 1013 (5th Cir. 1981), cert. denied sub nom. Meinster v. United States, 457 U.S. 1136 (1982); United States v. Barnes, 604 F.2d 121, 157 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); United States v. Bolts, 558 F.2d 316, 320-21 (5th Cir.), cert. denied sub nom. Hicks v. United States, 434 U.S. 930 (1970); United States v. Sperling, 506 F.2d 1323, 1344 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975). They contend, however, that these cases do not stand for the proposition that the required five people need only act sometime during the course of the related drug violations. Instead, the claim is that these cases simply find that the five people need not have been acting

at the same moment during each specific violation, and, accordingly, defendants concede that for each underlying violation it would be sufficient for the five people to have been involved in such at different times.

We, however, are unpersuaded by either of defendants' constructions of Section 848. The Second Circuit in United States v. Sperling, 506, F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975), rejected a defendant's contention that his CCE conviction was improper because the evidence failed to show that five people were working in his narcotics business at the same moment. The court noted that the defendant Sperling was an operational kingpin of a highly organized, structured and on-going narcotics network and that the evidence clearly showed that during the relevant time period charged in the indict-

ment, greater than five people were engaged in Sperling's narcotics operation and were directly under his supervision. Id. at 1344. In deciding that Section 848 did not require proof that at least five people worked under the defendant at the same moment, the court found the statute merely required proof that the person charged acted "'in concert with five or more other persons' and as to them that he occupied 'a position of organizer, a supervisory position, or any other position of management.'" Id.

As stated, defendants argue that Sperling and the cases which later followed are distinguishable on the ground that these cases did not hold specifically that five people need only work for a defendant some time during the course of the violations comprising the series, regardless of the number of people who participated in

the underlying violations. Accordingly, they argue that we would not be in conflict with other circuits if we were to hold that Section 848 requires proof that at least five people worked under a defendant's supervision on each violation comprising the series of violations, whether or not the minimum five people worked simultaneously on each violation.

We disagree. In United States v. Smith, 690 F.2d 748 (9th Cir. 1982), cert. denied sub nom. Fisherman v. United States, 460 U.S. 1011 (1983), the defendant challenged his CCE conviction by arguing that the government failed to prove that he directly supervised five people for each of the acts embodying the continuing series of violations. Id. at 749. The jury convicted the defendant on six counts in the fifteen-count indictment. To support his claim of improper CCE conviction, the defendant

emphasized that four of the substantive counts of the indictment involved fewer than five people. Notwithstanding, the Ninth Circuit, in Smith, relied on Sperling and rejected the defendant's construction of Section 848 by reasoning that it was not necessary for the government to show that "the organizer worked with five or more persons at the same moment." Id. at 750. Needless to say, we consider the holding of the case to be more important than the use of the Sperling language.

We agree with the Ninth Circuit's construction of Section 848 and hold that the five other persons mentioned in the statute need not be under a defendant's supervision at the same moment nor in the conduct of the same underlying felony. It is enough that they are found to be under the defendant's supervision in the conduct of the same continuing criminal enterprise,

as here.

We think the record fairly shows that both Cheek and Rhodes acted in concert with five or more other persons and that each occupied a position of organizer, supervisor, or manager with respect to those individuals. There is credible evidence to show that from the period of October 1979 through April 1980 Cheek occupied a position of organizer, supervisor, or manager with respect to Rocky Townsend, Dorothy Hodges, Peggy Jordan, Judy Cheek, Shelton Wiles, Tony Sidden, Gloria Sidden, and Wayne Shepherd, to name a few. Thus, as to Cheek, the evidence clearly was sufficient to support his CCE conviction. Likewise, we think the evidence is sufficient to support Rhodes' conviction since it fairly shows that from October 1978 through October 1980 Rhodes occupied a managerial, supervisory or organizational position with

respect to at least six individuals, including Jeffrey VanMeter, Clay Green, Wayne McNeil, Kim Edmiston, Peggy Jordan, and Dorothy Hodges.

EIGHTH AMENDMENT

Cheek and Rhodes assert that imposition of their respective sentences is cruel and unusual punishment in violation of the Eighth Amendment because the sentences are disproportionate to the crimes for which they were convicted. At the time Cheek received his sentence of 75 years without parole, we are told he was 38 years old. Assuming the maximum amount of good time credit as provided in 18 U.S.C. Section 4161, Cheek would have to serve approximately 50 years, thereby becoming eligible for release at the age of 88. At the time Rhodes received his 50-year sentence without the possibility of parole, he was 42 years old. Accounting for maximum good

time credit, Rhodes would have to serve approximately 33-1/3 years of this sentence and would become eligible for release at the age of 76.2 Cheek and Rhodes argue that their respective sentences are effectively life sentences without parole, given their advanced years, upon their prospective release dates under present law. Because, they argue, the sentences are de facto life sentences without possibility of parole, they maintain that the Supreme Court's recent decision in Solem v. Helm, 463 U.S. 277 (1983), requires us to undertake an extensive proportionality review of defendants' sentences in accordance with a three-part test announced by the Court.

In Solem, the Supreme Court declared

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2 These prospective dates for release are only illustrative, however. Cheek currently is serving another sentence, and the sentencing judge found that the CCE sentence would run consecutively with that sentence. Rhodes, on the other hand, has been free on bond since his CCE conviction.

unconstitutional a sentence of life imprisonment without possibility of parole and, in so doing, set forth a three-part test involving "objective factors" to use in reviewing the proportionality of sentences under the Eighth Amendment. 463 U.S. at 290-303. Significantly, the Court in Solem held for the first time that a noncapital sentence was disproportionate to the crime committed and stated, "we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. at 290. In declaring the life sentence imposed under South Dakota's recidivist statute disproportionate, Solem distinguished the earlier decision of Rummel v. Estelle, 445 U.S. 263 (1980), which had upheld imposition of a life sentence under Texas' recidivist statute, on the ground that the defendant Rummel was eligible for parole,

while, under South Dakota law, no prospect of parole attached to Helm's life sentence.3 463 U.S. at 297 & n. 24, 300-03.

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3. The defendant Rummel was convicted in a Texas state court for two separate felonies: fraudulent use of a credit card to obtain $80 worth of goods or services and passing a forged check in the amount of $28.36. Rummel v. Estelle, 445 U.S. 263 (1980). Rummel pleaded guilty to the 1964 credit card offense and was sentenced to three years' imprisonment. He also pleaded guilty to the 1969 forgery offense and was sentenced to four years' imprisonment. In 1973, Rummel was charged with obtaining $120.75 by false pretenses. Since the latter offense was classified as a felony under Texas law, the prosecution proceeded against Rummel under Texas' recidivist statute and, pursuant to such, Rummel received a mandatory life sentence with the possibility of parole. 445 U.S. at 265-66, 278.

In Solem v. Helm, 463 U.S. 277 (1983), the defendant Helm was convicted of what the Court classified as six nonviolent felonies under South Dakota law during the period between 1964 and 1975. 463 U.S. at 279. These convictions included third-degree burglary in 1964, 1966, and 1969; obtaining money under false pretenses in 1972; grand larceny in 1973; and, in 1975, a third offense of driving while intoxicated, punishable as a felony. In 1979 Helm was charged with uttering a "no account" check for $100 and pleaded guilty to the uttering offense, which, ordinarily, would have carried with it a sentence of five years' imprisonment and a $5,000 fine. However, because of his prior

The question left open after Solem is whether, because a life sentence without possibility of parole will cause a proportionality review, a severe sentence of a term of years, as here, similarly requires review. We note this issue to emphasize the fact that notwithstanding the Court's review of such a life sentence in Solem the Court has never set aside as cruel and unusual punishment a sentence for a term of

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record, Helm was subject to the South Dakota recidivist statute. Under the statute, Helm received a life sentence without possibility of parole. Id. at 281-82.

In distinguishing Rummel, the Solem Court noted that Helm's sentence was far more severe than Rummel's because, at the time the Court considered Rummel's sentence, it was likely that Rummel would have been eligible for parole within 12 years of his initial confinement. Id. at 297. On the other hand, given the fact that Helm was sentenced for life with no possibility of parole, the Court commented that capital punishment was the only punishment exceeding Helm's in severity. Id. Furthermore, the Court specifically refused to decide Solem under the reasoning of Rummel by equating the possibility of parole that existed in Texas with the possibility of executive clemency that existed in South Dakota. Id. at 300.

years that is within the limits set by statute. See Hutto v. Davis, 454 U.S. 370, 372 (1982) (per curiam).

In Hutto v. Davis, 454 U.S. 370 (1982) (per curiam), the Supreme Court reversed an en banc decision of this court in which we had affirmed the district court's invalidation of consecutive sentences for a total term of 40 years upon finding such sentences disproportionate to the crime committed. See Davis v. Zahradnick, 432 F.Supp. 444 (W.D. Va. 1977), aff'd sub nom. Davis v. Davis, 646 F.2d 123 (4th Cir. 1981) (en banc) (per curiam), rev'd. sub nom. Hutto v. Davis, 454 U.S. 370 (1982). Relying on its earlier pronouncement in Rummel, the Court in Davis emphasized that courts "should be 'reluctant to review legislatively mandated terms of imprisonment'" and, moreover, that "'successful challenges to the proportionality of parti-

cular sentences' should be 'exceedingly rare.'" 454 U.S. at 374, quoting Rummel, 445 U.S. at 272, 274. Therefore, to the extent that Solem does not overrule the reasoning of Rummel and Davis but, rather, explicitly accepts the position asserted in those challenges will be extremely rare, 463 U.S. at 289-90, it seems to us that Solem requires an extensive proportionality analysis only in those cases involving life sentences without parole. We are inclined to interpret Solem in this light, especially given the Solem Court's refusal to overrule Rummel and Davis, and accordingly uphold the terms of years' sentences herein as appropriate sentences within the limits set by Congress.

Such a disposition is complicated, however, by the fact that defendants equate their sentences for terms of years without parole with life sentences without parole

because of their ages. Thus, as an alternate ground for our decision, we uphold the sentences because they withstand an analysis under Solem. Defendants rely on United States v. Darby, 744 F.2d 1508 (11th Cir. 1984), cert. denied, ____ U.S. ___(1985), as authority for this court to undertake an extensive proportionality review. In Darby, the court determined that Solem required an extended analysis of the proportionality of two 60-year sentences imposed under Section 848 because it found the scheme prescribing enhanced penalties for federal drug violations to be similar to the recidivist statutes involved in Rummel and Solem, 744 F.2d at 1526. The court then undertook a thorough review by applying the three-part Solem test to consider "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in

the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id., quoting Solem, 463 U.S. at 292. After the court conducted its extensive review, it determined that although the sentences were severe, they were "not so grossly disproportionate to their crime to constitute cruel and unusual punishment." Id. at 1526-29.

With respect to the appropriate steps we should now take, we note that the Supreme Court in Solem warned:

> Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial court possess in sentencing convicted criminals.

463 U.S. at 290. By way of footnote, the majority further added:

> . . .we do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is

> not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Id. at 290 n. 16 (emphasis added).

Unlike the court in Darby, we do not think that the sentences imposed in this case require an extended proportionality analysis. Given the substantial deference that should be accorded Congress and the sentencing court, our duty is to decide whether the sentences under review are within the constitutional limits. See 463 U.S. at 290 n. 16. Such a review, as one court has noted, often requires at least a perfunctory Solem analysis. See Moreno v.

Estelle, 717 F.2d 171, 180 & n. 10 (5th Cir. 1983). While we would not use the same adjective to describe the analysis because of its overtones, we think that court meant less than extended and are of opinion that in cases where an Eighth Amendment claim is made concerning the length of a sentence which may not be disposed of as so obviously within the prerogative of Congress and the district court to require no comment, that a simple matching of the facts of a particular case against the Solem principles will suffice without extended discussion. That is what we do here.

After reviewing Cheek's and Rhodes' sentences under the principles set forth in Solem, we are of opinion that they are not disproportionate within the meaning of the Eighth Amendment. There is no doubt that their crimes were indeed serious. They

were involved in many importations and distributions of cocaine and marijuana. There was evidence that Rhodes and Cheek opened up the Wilkes County market for illegal drugs for Jorge Aragon. Time after time during 1978 through April 1980, both defendants actively participated in bringing large quantities of controlled substances into North Carolina. The marijuana involved was measured by the ton and the cocaine by the kilogram; millions of dollars were involved; so this was not the operation of small scale dope peddlers selling on street corners. Continuous large-scale drug trafficking is a grave offense and Congress chose to impose severe penalties for it. See H.R. Rep. No. 1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4566, 4576. Furthermore, many defendants convicted under Section 848 have received sentences

comparable to those Cheek and Rhodes received. See United States v. Love, No. 83-5171 (4th Cir. July 3, 1985); Darby, 744 F.2d at 1528-29 (citing cases). In many of these case, moreover, the validity of the severe sentences was not attacked. We note that while cases under Section 848 involve many different fact situations which may appear to be either more or less serious than the offenses involved here, insofar as sentencing is concerned Congress drafted the penalty provisions of the Controlled Substances Act, see 21 U.S.C. Sections 801 et seq., to "give maximum flexibility to judges, permitting them to tailor the period of imprisonment . . . to the circumstances involved in the individual case." H.R. Rep. No. 1444, supra, at 4576. We also note that the House Report above referred to, 1970 U.S. Code Cong. & Ad. News, p. 4575, quotes with approval the

Prettyman Report (Report of the President's Advisory Committee on Narcotics and Drug Abuse, November 1963), which we think fairly states the intent of Congress as follows:

> The illegal traffic in drugs should be attacked with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive.

Considering the large amount of illegal drugs involved, the huge amounts of money, the extent of the operation, and the number of people involved, we do not think that the sentencing court abused its discretion in imposing severe sentences on the defendants, particularly in light of the fact that Congress intended for judges to tailor specific sentences according to the circumstances involved in each case to make participation in the drug traffic too dangerous to be attractive.

We conclude that the sentences, although they are indeed severe, are not disproportionate to the crimes committed so as to constitute cruel and unusual punishment.

BAD ACTS EVIDENCE

Cheek and Rhodes individually raise several assignments of error concerning the admission of evidence of other crimes and wrongs which were not charged in the indictment. We will address their contentions separately.

Cheek objects to the admissibility of evidence surrounding his purchase of two Ferrari automobiles for $33,000 each, which he paid for in case, for which payment he declined to accept receipts. He had the cars titled in the name of his mistress. The argument is that this was proof of inadmissible bad acts under FRE 404(b). We think, however, that proof of such large

cash purchases in the circumstances present here was relevant evidence under 21 U.S.C. Section 848(b)(2)(B) which requires proof that a defendant obtain substantial income or resources on account of one or more of the series of violations mentioned in the statute.

The evidence introduced by the government as to Cheek's personal drug use, as well as the general pattern of his personal life, we do not think was plain error.

Finally, with respect to this aspect of Cheek's argument, as his brief may be read to object to the closing argument of the United States Attorney, even if the argument went too far, which is doubtful and which we do not decide, it was not reversible error because there was no motion for a mistrial.

We next consider Rhodes' claim of reversible error based on the admission of

three state court convictions: misdemeanor possession of less than one ounce of marijuana on February 12, 1981; misdemeanor possession of cocaine on April 9, 1980; and simple felonious possession of cocaine on November 1, 1983. Rhodes argues that admitting evidence of the three convictions was improper because it was irrelevant and, even if it was relevant on a disputed issue, it nevertheless was highly prejudicial because it depicted him as a bad person, drug use, and convicted drug offender. Specifically, Rhodes claims that the convictions were inadmissible under Rule 404(b) because there was no disputed issue concerning his motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. The trial judge, however, specifically stated that he was admitting the convictions because of the line of defense Rhodes had raised and that

in his opinion the probative value of the convictions outweighed the prejudicial effect.

Rhodes was charged in Count 1 with conspiring with others to possess and distribute cocaine and marijuana from August 1978 through April 1980. The government charged as a manner and means of the conspiracy that three individuals, not including Rhodes, were involved in a four kilogram cocaine transaction in November 1979. While the indictment charged Rhodes specifically with conspiracy to possess and distribute cocaine and marijuana, it did not otherwise charge or connect Rhodes to any specific cocaine transaction. Notwithstanding Rhodes' apparent lack of involvement in the specific cocaine transaction charged as a manner and means of the conspiracy, it was the government's theory that the cocaine transaction was undertaken

to generate money to cover the expenses for an upcoming marijuana transaction. The indictment charged Rhodes with participation in the subsequent marijuana transaction. Rhodes maintains that since the government was able to tie the cocaine and marijuana operations into one conspiracy and since there was no proof that Rhodes was involved in the four kilogram cocaine sale, the government introduced the two cocaine convictions so that the jury would think that Rhodes nevertheless was involved in the November 1979 cocaine transaction. Such admission, Rhodes asserts, was improper under Rule 404(b) since his defense was not lack of knowledge or intent, but, rather, that he was not involved in the specific four kilogram transaction. Moreover, he claims that he was prejudiced by the introduction of the cocaine convictions, which were subsequent in time to the

1979 cocaine transaction and involved only possession of cocaine. He argues that, even though the government could not prove his involvement in the large cocaine distribution transaction, the jury could infer on the basis of his past cocaine possessions that he was involved in it. Similarly, Rhodes contends that it was improper to admit the misdemeanor marijuana conviction because his defense was not lack of motive, intent, or knowledge regarding the charges against him for marijuana possession and distribution. As with the cocaine charge, Rhodes argues that his defense on the marijuana charges was that he did not participate in the specific acts.

During opening statements, counsel for Rhodes depicted Rhodes as a professional gambler who south to ingratiate himself with people who had money so that he could win their money by gambling. Counsel

painted Rhodes as never an organizer or importer of drugs and proposed that he merely stayed around to collect from those who owed him gambling debts.1 Throughout presentation of the government's case-in-chief, Rhodes' counsel on cross examination raised the issue of Rhodes' involvement with cocaine. For example, on cross examination of Rocky Townsend, counsel asked, "You've never known Mr. Rhodes to be involved in any cocaine transaction whatsoever, have you?," and the witness responded "No." Similarly, on cross examination of Dorothy Hodges, counsel asked "You've never known Mr. Rhodes to be involved in any cocaine

---

1. Just as an opening statement does not make admissible evidence to contradict it, see United States v. Basis Construction Co., 711 F.2d 570, 574 (4th Cir.), cert. denied, 104 S.Ct. 371, 527 (1983), neither does it call for admitting bad acts of the defendant into evidence. United States v. Hadaway, 681 F.2d 214, 218 (4th Cir. 1982). But an opening statement as here certainly may be taken into account by the trial court in ascertaining a theory of defense.

distribution at all, have you?," to which the witness responded, "Not a large amount, no." Upon further questioning concerning Hodges' knowledge of Rhodes' involvement with cocaine, Hodges responded that she had obtained a gram or two or cocaine from Rhodes. Counsel also cross examined Jorge Aragon and Jeffrey VanMeter on the matter of Rhodes' involvement with cocaine. Aragon stated that he had never been involved in a cocaine transaction with Rhodes, and VanMeter testified that he had never known Rhodes to sell and distribute cocaine.

We think that the cocaine convictions were properly admitted under FRE 404(b) and that the district court did not abuse its discretion in determining that the probative value outweighed the prejudicial effect. Rhodes defended himself on the ground that as a professional gambler he merely associated with the real drug con-

spirators so they could gamble away their drug money. He consistently questioned the government's witnesses concerning their knowledge of his involvement with cocaine in an attempt to divorce himself from connection with the drug. To the extent then that Rhodes defended on the ground that he was present but innocent, he placed his intent in issue. By asking government witnesses whether they had ever known him to be involved with cocaine, the cocaine convictions became admissible to contradict the attempt to disassociate Rhodes from connection therewith. We think that under the liberal construction lately given by this circuit to Rule 404(b) and like theories, it was not reversible error to admit the cocaine convictions on the issue of Rhodes' intent. See United States v. Hadaway, 681 F.2d 214 (4th Cir. 1982); United States v. Masters, 622 F.2d 83 (4th

Cir. 1980); United States v. DiZenzo, 500 F.2d 263 (4th Cir. 1974); United States v. Woods, 484 F.2d 127 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974).

Additionally, we find that the marijuana conviction was properly admitted. The conviction was based on the discovery of marijuana that police officers found in a drain in Rhodes' garage during the course of lawful search on March 22, 1980. This search, as we will describe more fully below in relation to the Fourth Amendment claim, uncovered a spiral notebook with names and figures which the government at trial introduced to show that Rhodes was in fact in the drug business and was involved with Cheek in such. The officer who conducted the search of Rhodes' house and garage testified as to what he found on the premises. We agree that admitting proof of the conviction was admissible under Rule

404(b) since Rhodes' defense that he was present but innocent placed his intent with respect to marijuana in issue. Moreover, we do not think that the trial court abused its discretion in ruling that the probative value outweighed the prejudicial effect.

REMAINING ISSUES

During a search of Rhodes' house on March 22, 1980, police officers seized a spiral notebook that allegedly contained drug business records which related to the dealings between Cheek and Rhodes on the November 1979 marijuana importation. The search was conducted pursuant to a search warrant which authorized seizure of certain containers of brown vegetable material and rolling papers. At the suppression hearing, Officer Hamilton testified that the closed notebook was next to some marijuana on a kitchen counter and that he picked it up and flipped through the pages. The

notebook contained names, numbers, and figures. Hamilton testified that he looked at the notebook because, based on his experience as a law enforcement office, he was aware that drug dealers customarily kept records of their drug dealings. The government maintains that the seizure was justified under the plain view exception to the warrant requirement since the search warrant did not extend to authorize seizure of the notebook. The government further contends that admission of photocopies of the notebook's contents was proper under FRE 1003 and 1001(4). We agree that under the authority of United States v. Crouch, 648 F.2d 932 (4th Cir.), cert. denied, 454 U.S. 952 (1981), the seizure of the notebook was justified by the plain view exception and that photocopies of the contents of such were admissible. Upon such a finding, we need not decide whether Cheek

had a protectable privacy interest in the notebook seized from Rhodes' house.

Rhodes separately alleges that it was error for the court to admit a statement Rhodes made allegedly during the course of custodial interrogation. When Officer Hamilton picked up the spiral notebook during the search of Rhodes' house, Rhodes said, "You can't take that." Hamilton then asked, "Why," to which Rhodes responded, "I can't run my business without that." Rhodes moved to suppress the second statement on the ground that his response to Hamilton's question "Why" amounted to custodial interrogation. Since he had not been given his warnings under Miranda v. Arizona, 384 U.S. 436 (1966), Rhodes claims that the statement should have been suppressed. The government claims that the statement was admissible because Rhodes was not in custody at the time and because no

interrogation occurred.

We do not need to decide the issue whether Rhodes' statement was made while he was "in custody," see Minnesota v. Murphy, 52 U.S.L.W. 4246,4249 (U.S. Feb. 22, 1984), because we think the district court correctly determined that Rhodes made a spontaneous statement which was not the product of interrogation. Before Rhodes told Officer Hamilton that he could not have the spiral notebook, Hamilton had had no communication with Rhodes beyond reading the search warrant to him. It is apparent that the police officer did not initiate the conversation that ensued. Viewing the context within which Rhodes made the statement he now seeks to suppress, we agree that Rhodes' response was spontaneous and not the product of interrogation. Thus, we find that the statement was admissible and follow the reasoning of United States v.

Grant, 549 F.2d 942, 946 (4th Cir.), cert. denied, 432 U.S. 908 (1977), where we stated that Miranda does not protect an accused "from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers."

We have considered the other assignments of error and find them to be without merit.

Accordingly, the judgment of the district court is

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 84-5241
84-5242

United States of America,

Appellee

versus

James Alvin Rhodes
and Garvey Martin Cheek, Jr.,

Appellants

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Phillips and Judge Sneeden.

CERTIFICATE OF SERVICE

I, Thomas Franklin Loflin III, a member of the Bar of the Supreme Court of the United States and counsel of record for James Alvin Rhodes, petitioner herein, hereby certify that on March 28, 1986, pursuant to Rule 28, Rules of the Supreme Court, I served copies of the foregoing Petition for Writ of Certiorari on the opposing party as follows:

On the Respondent United States of America by depositing three copies in the U.S. Post Office in Durham, N. C., with first-class postage prepaid, properly addressed to: Solicitor General, Department of Justice, Washington, D.C. 20530.

I further certify that all parties required to be served have been served.

Dated March 28, 1986.

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Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1605

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES ALVIN RHODES AND GARVEY MARTIN CHEEK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of engaging in a continuing criminal enterprise under 21 U.S.C. 848 when the evidence showed that they occupied managerial positions with respect to five or more people during the course of the criminal enterprise but not during each of the underlying felony drug violations.

2. Whether petitioners' sentences for terms of years were so disproportionate to their offenses as to violate the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1605

JAMES ALVIN RHODES AND GARVEY MARTIN CHEEK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 779 F.2d 1019.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985. A petition for rehearing was denied on January 29, 1986 (Pet. App. 60a). The petition for a writ of certiorari was filed on March 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioners were convicted on one count of conspiracy to possess and distribute cocaine and marijuana, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 1), two counts of possession of

more than 1000 pounds of marijuana with intent to distribute it, and two counts of distribution of more than 1000 pounds of marijuana, all in violation of 21 U.S.C. 841(a)(1) (Counts 4-7). Petitioner Cheek was also convicted on one count of possession of cocaine with intent to distribute it, and one count of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 3), as well as three Travel Act violations (18 U.S.C. 1952) (Counts 8, 10, and 11). Both petitioners were also convicted on separate counts of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. (& Supp. II) 848 (Counts 12 and 16). On the substantive counts, petitioner Cheek received a total sentence of 75 years' imprisonment, and petitioner Rhodes received a total sentence of 45 years' imprisonment. On the CCE counts, Cheek and Rhodes were sentenced to 75 years' and 50 years' imprisonment, respectively. The court of appeals affirmed in a lengthy opinion (Pet. App. 1a-59a).

The evidence adduced at trial, which is not in dispute, is summarized in the opinion of the court of appeals. The evidence showed that Cheek and Rhodes were involved in a series of drug transactions between October 1978 and the spring of 1980. In late 1978 Cheek unloaded 17,000 pounds of marijuana at a farm in Alexander County, North Carolina, which Rhodes had previously used for distributing marijuana. Rhodes and two other men worked together to sell a portion of the 17,000-pound load. Through one of his associates, Jeffrey VanMeter, Rhodes also bought a quantity of marijuana from Jorge and Fred Aragon in the fall of 1978. In early 1979, Rhodes met with the Aragon brothers to discuss the possibility of helping the Aragons purchase an airplane for future smuggling ventures by air instead of by sea. Rhodes subsequently received some marijuana from a successful airdrop the Aragons conducted in the spring of 1979. Pet. App. 13a-15a, 779 F.2d at 1022-1023.

In May or June of 1979, Rhodes obtained a load of marijuana from Fort Lauderdale. He sent several cars from North Wilkesboro to pick up the marijuana from two of his associates. Jeffrey VanMeter helped load the cars in Fort Lauderdale and then traveled to North Wilkesboro, where Rhodes gave him $600,000 to take back to the suppliers. A fourth person accompanied VanMeter back to Florida with the payment. The evidence showed that at least five other persons picked up carloads of marijuana in Florida for Rhodes in the summer of 1979. Pet. App. 15a-16a, 18a-19a, 779 F.2d at 1023.

In October 1979 Cheek arranged to purchase four kilograms of cocaine for $200,000. Cheek paid half the purchase price when he received the cocaine; he agreed to pay the balance to the supplier after he had sold the drugs. Together with his assistant, Rocky Townsend, Cheek drove with the cocaine from Florida to North Carolina, where he delivered the cocaine to another conspirator. Several weeks later, Cheek had Townsend deliver the balance of the original purchase price to the supplier at a motel in Charlotte, North Carolina. Pet. App. 6a-7a, 779 F.2d at 1021.

At the time of that cocaine transaction, Cheek and Rhodes had made arrangements to take part in a large marijuana importation, which was scheduled to take place around Thanksgiving of 1979. The Aragon brothers had agreed to obtain 5000 pounds of marijuana in Colombia, South America, and to transport it to southern Florida, where they would sell it to Cheek and Rhodes and another unnamed person. Cheek made arrangements to receive the marijuana from the offloaders and to transport it to a stash house for later distribution in North Carolina. He sent Townsend and two other associates to rent rooms at two motels in Homestead, Florida, where the marijuana would be received from the offloaders. As planned, the offloaders drove the marijuana from the coast to the motel rooms.

Rhodes then arranged for other drivers to take the marijuana to the stash house for unloading and weighing. Cheek and two other men weighed and numbered the bales of marijuana when they arrived at the stash house. Two of Rhodes' assistants then loaded a motor home with marijuana that the stash housecrew had processed. After all but some 1200 pounds of wet marijuana had been removed from the stash house for distribution, Cheek and two of the other conspirators traveled to Charlotte, North Carolina, and then to petitioner Rhodes' house in North Wilkesboro, where they met Rocky Townsend, who had driven from Florida with a load of the wet marijuana. Cheek and Jorge Aragon spread out the marijuana in Rhodes' garage to try to dry it out. Pet. App. 16a-17a, 779 F.2d at 1023. Aragon was still waiting for payment for the marijuana, so Cheek directed Townsend to drive to Cheek's house in Florida and pay Aragon $500,000 for the marijuana. Pet. App. 8a-10a, 779 F.2d at 1021-1022.

Shortly after the Thanksgiving 1979 venture, Jeffrey VanMeter also drove a separate load of 600 to 700 pounds of marijuana, which had been supplied by two of Rhodes' associates, from Florida to North Carolina. Rhodes paid VanMeter $1000 for transporting the load. Pet. App. 17a, 779 F.2d at 1023.

In the spring of 1980, Cheek traveled to Barranquilla, Colombia, with Jorge Aragon to arrange another marijuana transaction. They planned to airdrop 10,000 pounds of marijuana onto a yacht off the Florida Keys, unload it at a house in Islamorada in the Keys, and distribute it to Cheek, Rhodes, and other unnamed "people up north." Fred Aragon arranged for the Islamorada house and his brother Jorge stayed in the Florida Keys to monitor Coast Guard movement. Before the airdrop, Jorge Aragon contacted Cheek and told him he needed more money for the Islamorada operation. Cheek in turn contacted one of his

assistants and told him to send someone to Florida with more money. The next day, Cheek's wife arrived at Islamorada and gave Cheek $10,000. Cheek gave the money to Aragon and directed Rocky Townsend to help Aragon monitor Coast Guard activity. The marijuana was successfully airdropped and unloaded at the Islamorada house, where Cheek, Aragon, Townsend, and another person weighed the marijuana, separated the bales that were wet, and loaded the dry bales into cars. Cheek hired Townsend and three others to help transport the marijuana to North Carolina for distribution. In addition, Aragon called Rhodes when the load arrived and told him to send someone to help transport the marijuana. Shortly thereafter, four drivers arrived in Islamorada, where they picked up 1100 pounds of marijuana. Pet. App. 17a-18a, 779 F.2d at 1023. Aragon subsequently traveled to North Carolina to collect from Cheek and Rhodes for their respective purchases of 6500 and 1100 pounds of the Islamorada marijuana. Pet. App. 11a-13a, 779 F.2d at 1022.

ARGUMENT

1. Petitioners challenge (Pet. 9-21) the sufficiency of the evidence to support their convictions under 21 U.S.C. (& Supp. II) 848, arguing that the proper construction of that statute requires proof that the defendant occupied a supervisory position with respect to five or more persons during each of the violations constituting the continuing criminal enterprise, and not merely during the life of the enterprise as a whole. The court of appeals correctly rejected this argument. Such a construction is not required by the language of the statute, and no other court of appeals has adopted the construction urged by petitioners. Accordingly, no further review of this question is warranted.

Petitioners concede (Pet. 19) that their argument was previously rejected in *United States* v. *Smith*, 690 F.2d 748, 749-750 (9th Cir. 1982), cert. denied, 460 U.S. 1041 (1983).

Every other court of appeals that has considered the question has also decided that the five persons supervised need not have worked with the defendant at the same time, and that it is sufficient that he supervised at least five people over the life of the enterprise. *E.g., United States* v. *Becton,* 751 F.2d 250, 254-255 (8th Cir. 1984), cert. denied, No. 84-1622 (June 17, 1985); *United States* v. *Young,* 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, No. 84-950 (Mar. 25, 1985); *United States* v. *Losada,* 674 F.2d 167, 173-174 (2d Cir.), cert. denied, 457 U.S. 1125 (1982); *United States* v. *Phillips,* 664 F.2d 971, 1013 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Mannino,* 635 F.2d 110, 116 (2d Cir. 1980); *United States* v. *Bolts,* 558 F.2d 316, 320-321 (5th Cir.), cert. denied, 434 U.S. 930 (1977); *United States* v. *Sperling,* 506 F.2d 1323, 1344 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

Petitioners argue that these cases, other than *Smith,* hold only that the five persons need not be supervised *at the same moment* during the commission of one violation but may instead be supervised at different times during the course of a single violation. Petitioners argue that these cases are therefore consistent with their interpretation that the defendant must have supervised five people during each of the three required violations. *Smith,* however, explicitly rejected petitioners' claim precisely as they have framed it. See 690 F.2d at 749-750. Moreover, in *United States* v. *Mannino,* 635 F.2d at 116-117, the Second Circuit upheld a conviction under Section 848 even though, as the court's review of the evidence makes clear, the defendant did not supervise five or more people during each of the substantive offenses. It was enough that the defendant had at least five employees during the life of the drug business. And in both *United States* v. *Becton,* 751 F.2d at 255, and *United States* v. *Losada,* 674 F.2d at 174, the courts stated that the evidence showing the defendant's supervision of at least five

people during the course of the continuing criminal enterprise was sufficient to support convictions under Section 848.

This uniform interpretation of the statute is consistent with its language and purpose. Contrary to petitioners' view of the statute, there is no explicit language in Section 848 requiring that five or more people be supervised in *each* of the series of violations committed in the course of the criminal enterprise. The relevant portion of Section 848 reads as follows:

> [A] person is engaged in a continuing criminal enterprise if— * * *
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management * * *.

Petitioners claim that the language of the statute indicates that Congress intended the supervisory requirement to apply to the "violations" instead of merely to the "series" of which each violation is a part (Pet. 11-12). Even accepting that contention, the phraseology used in the statute is a perfectly natural way for Congress to express a requirement that the violations, taken together, must be conducted in concert with five or more persons. If Congress had meant for the statute to require that each violation be undertaken in concert with five or more persons, it presumably would have included the word "each" in the statute.

The construction of the statute adopted by the court of appeals in this case is entirely consistent with the stated intention of Congress to reach drug "kingpins," *i.e.*, those persons who operate lucrative businesses manufacturing or selling illegal drugs. H.R. Rep. 91-1444, 91st Cong., 2d Sess. Pt. 1, at 10 (1970). The construction of the statute by the court of appeals does not, as petitioners suggest (Pet. 18-19), reach defendants who lead small, shifting groups that Congress could not have intended to brand as continuing criminal enterprises. Rather, by requiring substantial profits from the continuing criminal enterprise (21 U.S.C. 848(b)(2)(B)) in addition to the organization, supervision, or management of five or more other persons, Congress has ensured that only truly significant operations, such as the one in this case, will come within the reach of this statute.[1]

Petitioners' analogy to another statute, 18 U.S.C. 1955, does not further their argument. That statute makes it a federal offense to operate a large-scale gambling business that is illegal under state or local law, if the business is in

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[1]It is true, of course, that profitable drug businesses that employ only four people are excluded from the statute's coverage, whereas an operation with changing personnel totaling at least five is included. But it is not an unreasonable judgment that, once a certain number of people are involved under the leadership of one or more others, the criminal activity has become organized enough to require more severe measures regardless of whether the leader enlists his subordinates all at once or at different times and for different crimes. It is well settled that Congress is not compelled to regulate all aspects of an area equally or at one time (*New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)). If anything, the "absurd results" that petitioners suggest (Pet. 18-19) show only that the continuing criminal enterprise statute may be underinclusive by not reaching the defendant who employs only four persons in repeated drug transactions. There is no reason to believe that, by leaving that person out of the statute's coverage, Congress meant also to exempt from coverage those who employ five, or ten, or 100 people in repeated drug transactions but never employ more than four in connection with any single violation.

continuous operation for at least 30 days. Petitioners point out (Pet. 15) that Section 1955 has been interpreted to require the participation of at least five people, albeit not the same five, at all times during the 30-day period. *E.g., United States* v. *Gresko,* 632 F.2d 1128, 1132-1133 (4th Cir. 1980); *United States* v. *Marrifield,* 515 F.2d 877, 882 (5th Cir.), cert. denied, 423 U.S. 1021 (1975). The wording of Section 1955, however, is significantly different from that of Section 848.

In Section 1955, an "illegal gambling business" is defined in part as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business" (18 U.S.C. 1955(b)(1)(ii)). Congress, unconcerned with minor gambling operations of only local interest, aimed its penalties at systematic enterprises that are so large that they require the involvement of at least five people at any one time for their operation. *United States* v. *Gresko,* 632 F.2d at 1132-1133. Everyone involved in the conduct of such a business, no matter how minor his role or how occasional his participation, is subject to prosecution under this provision. *Sanabria* v. *United States,* 437 U.S. 54, 70 n.26 (1978); *United States* v. *Greco,* 619 F.2d 635, 638-639 (7th Cir. 1980); *United States* v. *Avarello,* 592 F.2d 1339, 1349 (5th Cir.), cert. denied, 444 U.S. 844 (1979). It is the size and duration of the enterprise, not the individual's role, that matters.[2]

---

[2]The operation of Section 1955 illustrates how it is possible to invoke seemingly anomalous comparisons to attack almost any interpretation of a statute that attempts to identify significant criminal activity by means of numerical tests. Under Section 1955, a person who participates in a minor way for just a few days in a gambling operation that lasts for 30 days may be convicted, whereas the leader of a gambling operation that lasts 29 days may not. That comparison does not suffice to override the intent of Congress in enacting Section 1955. Nor does petitioners' comparison between the leader of a small, changing group of drug offenders and a cohesive group of four large-scale narcotics operators suffice to undermine the settled interpretation of the continuing criminal enterprise statute.

The CCE statute, on the other hand, focuses on the role of the individual. It is aimed only at those drug "kingpins" who occupy a supervisory position in an illegal drug enterprise. See *Garrett* v. *United States,* No. 83-1842 (June 3, 1985), slip op. 8. The five-person requirement is not so much a way to distinguish one enterprise from another as a way to identify those individuals who exert the control and reap the large monetary rewards of the illicit business. The record in this case shows that petitioners, who enlisted the aid of numerous people in the multimillion-dollar importation and distribution of thousands of pounds of illegal drugs, are precisely the kind of persons the statute was designed to reach.

2. Petitioners also claim (Pet. 22-30) that the court of appeals did not engage in sufficiently "extensive" analysis of their claim that their sentences are so disproportionate to the CCE offense as to violate the Eighth Amendment. Petitioners offer virtually no argument that the court of appeals reached the incorrect result. Instead, they attack the way in which the court came to that result. Their argument is without merit.

This Court stated in *Solem* v. *Helm,* 463 U.S. 277 (1983), that a reviewing court should be guided by three objective criteria in determining whether a sentence is unconstitutionally disproportionate to the offense. The court should compare the gravity of the offense and the harshness of the penalty; it should examine the sentence at issue in view of the sentences imposed on other defendants in the same jurisdiction; and it should compare the sentence at issue with sentences imposed for the same crime in other jurisdictions (463 U.S. at 290-292).

The court of appeals made just such an analysis here and found that the sentences were not so disproportionate to the offense as to be unconstitutional (Pet. App. 38a-45a). Although petitioners contend (Pet. 24) that the court in this

case dealt only with the gravity of the offense and completely ignored the remaining factors, the court's opinion belies that claim. After noting the seriousness of the offenses, demonstrated by the repeated importations and distributions of cocaine and marijuana worth millions of dollars (Pet. App. 41a-42a), the court went on to a consideration of other sentences in similar cases. As noted by the court of appeals, the sentences imposed on petitioners are comparable to those imposed on many other CCE violators. The court's analysis on this point was succinct because it relied on the collection of similar CCE sentences found in *United States* v. *Darby,* 744 F.2d 1508, 1528-1529 (11th Cir. 1984), cert. denied, No. 84-1260 (May 13, 1985), rather than reciting all those sentences itself (Pet. App. 42a-43a).[3] Many of the sentences cited by the court in *Darby* were for life imprisonment without parole.[4]

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[3]The court in *Darby* recognized, 744 F.2d at 1528 n.15, that it is difficult to compare Section 848 with other federal crimes for which severe sentences are authorized, because the nature of the crimes is so different. For that reason, there is no merit to petitioners' complaint (Pet. 26) that the court of appeals in the present case erred by ignoring allegedly more serious federal offenses, such as assassination of the President, air piracy, and espionage, for which a life sentence without parole is not authorized. In addition, it is not necessarily true that a crime of violence or even espionage is always "more serious" than operating a continuing criminal enterprise. As suggested by Congress's determination that a life sentence without parole should be authorized for CCE but not for those other crimes (a quintessentially legislative judgment), a continuing criminal enterprise may have an effect on society that is at least as harmful as, if not more harmful than, an isolated act of violence or treachery.

[4]*United States* v. *Valenzuela,* 646 F.2d 352, 354 (9th Cir. 1980); *United States* v. *Sperling,* 560 F.2d 1050 (2d Cir. 1977); *United States* v. *Jeffers,* 532 F.2d 1101 (7th Cir. 1976), rev'd on other grounds, 432 U.S. 137 (1977). Additional cases involving life sentences under Section 848 are listed in our brief in opposition in *Milburn* v. *United States,* Nos. 85-69 and 85-5232. Both the opinion in *Darby* and our brief in opposition in *Milburn* also list a number of CCE sentences for terms of years comparable to those given petitioners. We are providing petitioners with a copy of our brief in opposition in *Milburn.*

The court of appeals did not explicitly address the third *Solem* factor, a comparison of the sentences with those imposed in other jurisdictions for similar crimes. But *Darby,* on which the court relied, noted that the unique nature of Section 848 and the special function it was intended to play in the comprehensive federal drug enforcement scheme make it difficult to compare with other state crimes, even those appearing to be equivalent (744 F.2d at 1529). The court in *Darby* held that, in view of Florida statutes authorizing severe sentences for narcotics offenses, there was "no serious disparity indicating that appellants' [60-year CCE] sentences are excessive" (744 F.2d at 1529).[5] The court below had no reason to reach a different conclusion or to elaborate on the *Darby* analysis. It correctly resolved petitioners' Eighth Amendment claim.

Petitioners ask this Court to grant certiorari because of certain language in the opinion of the court of appeals suggesting that an "extensive" analysis of this issue was not necessary. The court of appeals noted, as an alternative basis for its ruling on the Eighth Amendment issue, that "*Solem* requires an extensive proportionality analysis only in those cases involving life sentences without parole" (Pet. App. 37a) and that, "[u]nlike the court in *Darby,* we do not think that the sentences imposed in this case require an extended proportionality analysis" (*id.* at 40a). Whatever

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[5]Petitioners note (Pet. 26) that a North Carolina CCE statute authorizes life imprisonment. The severe sentence authorized in North Carolina tends to demonstrate the conformity of the federal CCE statute with the norms in other jurisdictions. And even if, as petitioners urge, the provision for parole in the North Carolina statute makes the federal statute materially more harsh, that is hardly dispositive. Neither *Solem* nor any other decision of this Court suggests that a sentence is unconstitutional because another jurisdiction punishes the same conduct less severely. Petitioners have no constitutional right to better treatment than other violators of federal law just because they live in North Carolina.

the merits of these observations, it is clear from the rest of the court's opinion that the court conducted an analysis that is fully consistent with *Solem*. Immediately after the language cited by petitioners, the court of appeals elaborated on the point in a way that makes clear its compliance with *Solem* (Pet. App. 40a-41a):

> [O]ur duty is to decide whether the sentences under review are within the constitutional lim its. * * * Such a review, as one court has noted, often requires at least a perfunctory *Solem* analysis. *See Moreno v. Estelle,* 717 F.2d 171, 180 & n. 10 (5th Cir. 1983). While we would not use the same adjective to describe the analysis because of its overtones, we think that court meant less than extended and are of opinion that in cases where an Eighth Amendment claim is made concerning the length of a sentence which may not be disposed of as so obviously within the prerogative of Congress and the district court to require no comment, that a simple matching of the facts of a particular case against the *Solem* principles will suffice without extended discussion. That is what we do here.

Moreover, as noted above, the court of appeals engaged in a fully adequate *Solem* analysis in the course of resolving the Eighth Amendment claim. The court either discussed itself, or relied explicitly or implicitly on the *Darby* court's discussion of, each *Solem* factor. Other than their incorrect assertion that the court ignored two of the *Solem* factors, petitioners do not suggest what the court should have done to make its analysis more "extensive." Any difference between the analysis in *Darby* and the analysis in this case, which relied on *Darby,* has more to do with how the courts of appeals labeled their own actions than with the substance of the decisions. In any case, *Solem* itself declares that "extended analysis" of "proportionality" claims will rarely be required (463 U.S. at 290 & n.16).

Thus, contrary to petitioners' assertion, the decision in the instant case does not conflict with *Darby* or with *United States* v. *Ortiz,* 742 F.2d 712 (2d Cir.), cert. denied, 469 U.S. 1075 (1984). Any disagreement as to the extent of the analysis required in each case is more semantic than substantive. In each case the court conducted an Eighth Amendment inquiry just as mandated by *Solem* v. *Helm, supra,* and in each case the court reached the same result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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